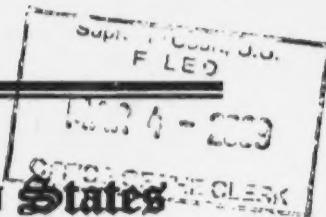


(4)
No. 08-971



IN THE

Supreme Court of the United States

ROBERT SIMPSON RICCI, *et al.*,
Petitioners,

v.

DEVAL L. PATRICK, in His Capacity as Governor of the
Commonwealth of Massachusetts, *et al.*,
Respondents,

MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS, INC., a/k/a Arc/Massachusetts, Inc.,
Respondent,

DISABILITY LAW CENTER, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS AND THE DISABILITY LAW CENTER'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Did the petitioners waive the issue of the standard of review, when they neither argued that that the standard for review of the district court's legal conclusions should be anything other than de novo, when they never even suggested to the First Circuit that it consider the deferential standard that they propose here, and when they failed to cite a single case to the First Circuit that they rely upon in their Petition?
- II. Is there a conflict among the courts of appeals that requires resolution by this Court, when every circuit court applies a de novo standard in reviewing a district court's interpretation of state law, or of state law requirements that are incorporated in a consent decree, as the First Circuit did here?
- III. Is there a conflict among the courts of appeals that requires resolution by this Court, when every circuit court applies a de novo standard in reviewing a district court's interpretation of the unambiguous provisions of a consent decree?

QUESTIONS PRESENTED—Continued

- IV. Where the parties provided in their consent decree that the State had discretion to allocate its resources and to close its public institutions, did the First Circuit properly conclude that the district court lacked jurisdiction to reopen a thirty-five-year-old case simply because the State decided to close one of its state-operated facilities, and despite the absence of any factual findings supporting a violation of federal law or of any provision of a fifteen-year-old disengagement order?

PARTIES TO THE PROCEEDING BELOW

The Petition for Writ of Certiorari incorrectly lists the Association for Retarded Citizens of Massachusetts, Inc., a plaintiff below, and the intervenor Disability Law Center, Inc. as petitioners. The Association for Retarded Citizens of Massachusetts, Inc. and the Disability Law Center, Inc. were aligned with the State respondents in opposing the district court's decision to reopen this thirty-five-year-old case and appealing the district court's order to the First Circuit. The Association for Retarded Citizens of Massachusetts, Inc. and the Disability Law Center, Inc. oppose the Petition and are among the respondents in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent, Massachusetts Association for Retarded Citizens, Inc., states that its name has changed to Arc Massachusetts, Inc. and that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

Respondent, Disability Law Center, Inc., states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.



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**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**RESPONDENTS MASSACHUSETTS
ASSOCIATION FOR RETARDED CITIZENS
AND THE DISABILITY LAW CENTER'S
BRIEF IN OPPOSITION**

STATEMENT OF THE CASE

The First Circuit reversed a district court's injunction that interfered with the State's closing of one of its public institutions. The lower court's injunction

was based solely on its novel interpretation of a state regulatory process that had been incorporated into a consent decree which ended the court's oversight of a thirty-five-year-old class action. Where the consent decree was drafted by the parties and approved by the district court essentially verbatim, where the trial judge had not been actively involved in its implementation or enforcement for over a decade, where the trial court's decision was based entirely upon its finding of a violation of a state regulatory process incorporated into the decree, and where the district court did not purport to interpret any other provisions of the decree, plenary review was appropriate and consistent with the approach taken by this Court and all of the Circuit Courts of Appeals. Moreover, the First Circuit's decision was not dependent upon its use of the well-established *de novo* standard for reviewing a district court's interpretation of provisions of state law or of unambiguous provisions of a consent decree, since under any standard of review it would have reached the same conclusion. There simply is no conflict among the Circuits presented by this case, and, therefore, the Petition should be denied.

A. Litigation History

This litigation began in 1972 when a complaint was filed challenging the conditions in the Belchertown State School for individuals with mental retardation. Over the ensuing four years, similar suits were commenced against four other state schools,¹ including the Fernald Developmental Center, which is the

¹ The Commonwealth's former state schools are now referred to as intermediate care facilities for the mentally retarded or ICF/MRs.

subject of the proceedings below. These five cases were consolidated and consent decrees resolving the issues raised in these actions were entered in 1977 and 1978.² *Ricci v. Okin*, 537 F. Supp. 817, 819 n.1 (D. Mass. 1982) (recounting the history of the litigation). By 1986, “conditions had improved to the point where ... the court entered an order ... which, in the court’s view, represented a ‘step of disengagement.’” *Ricci v. Okin*, 978 F.2d 764 (1st Cir. 1992).

B. The Disengagement Order

By 1993, the process of disengagement that the district court initiated in 1986 culminated in the entry of a final Disengagement Order covering all five of the consolidated cases. The Disengagement Order “supplant[ed] and replace[d] each of the consent decrees and all orders of the court in these matters.” *Ricci v. Okin*, 823 F. Supp. 984, 986 (D.Mass. 1993) (Order at Introduction and ¶ 1), P. App. 53.³ Contrary to the petitioners’ repeated assertions, it was not the trial court “that wrote the consent judgment.” Petition at 19, 20, 25, 33. Rather, as the record on appeal clearly documents, the Disengagement Order (hereafter DO) was “negotiated virtually word by word” by the parties and presented to the Court, which entered it without

² Contrary to the assertion in the Petition at 5, these consent decrees were not “crafted by Judge Tauro.” Rather, as the district court explained, they were the result of “hundreds of hours of study, negotiation, and planning” by “the individuals concerned” and “embod(ied) the parties’ collective assessment of the needs of the clients at the five state schools.” *Ricci*, 537 F. Supp. at 820 (internal quotation marks omitted).

³ Citation to the opinions and orders contained in the Appendix to the Petition will be to the Appendix and page, in the form, “P. App. ____.”

change. R. App. at 41a-53a (cover letter and copy of draft DO negotiated by the parties) (handwritten edits incorporated).⁴ The DO specifically provides that the five consolidated cases are "closed and removed from the court's active docket [and] [a]ny action to enforce the rights of the plaintiff classes may be brought before the court only pursuant to the terms of paragraph 7." DO at ¶ 1, P. App. 53.

Paragraphs 2, 4, 5, and 7 of the DO are relevant to the issues raised in this proceeding. Paragraph 2 requires the defendant Department of Mental Retardation (hereafter DMR) to provide appropriate services to the class members and to maintain individual service planning (ISP) regulations that are substantially equivalent to those in effect at the time of the DO, at least with respect to certain specific provisions. P. App. 54-56. Paragraph 4 specifies that DMR shall not approve a transfer of any class member from a state school to the community unless it certifies that the individual will receive "equal or better" services at the new location. P. App. 57-58. Paragraph 5 provides that nothing in the order is intended to limit DMR's discretion to manage its budget and allocate its resources to ensure equitable treatment of all individuals with mental retardation. P. App. 58. Paragraph 7 is "the exclusive means of enforcing" the DO and provides that if the defendants "substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic

⁴ A comparison of the draft DO negotiated by the parties and the DO entered by the court (P. App. 53-63) clearly demonstrates that the district court simply entered the DO as written by the parties. The trial court did not craft or draft the DO. Citations to materials in the Appendix to this brief will be in the form, "R. App. ____."

failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order." P. App. 59-61. However, ¶ 7.b explicitly provides that state law – "including but not limited to the ISP regulations" – shall not be enforceable by the district court. P. App. 60.⁵

C. The Motion to Reopen

The district court docket indicates that for eleven years following entry of the DO, no pleadings were filed and no action taken by the district court in these closed cases. During that time, DMR closed one of the five state schools without any injunctive orders from the district court like the one at issue here, despite opposition by an organizational plaintiff parent association. Indeed, in the year prior to entry of the DO, DMR had closed another school, also without court action. In its 2004 budget, the Massachusetts legislature directed DMR:

[I]n order to comply with the provisions of the Olmstead decision and to enhance care within available resources [to] take steps to consolidate or close [the s~~t~~ remaining] intermediate care facilities for the mentally retarded ... and submit a preliminary plan for the closure of the Fernald Developmental Center....

2003 Mass. Acts, ch. 26, § 2, line item 5930-1000. Similar language was included in the 2005 and 2006 state budgets. P. App. 6. In response to the legislative instruction to plan for the closure of Fernald and other state schools, the parents of Fernald class members filed a motion in 2004 in the district court seeking to reopen the case, alleging that the defendants

⁵ A more detailed analysis of these provisions is found in the First Circuit decision. P. App. 10-13.

were systemically violating the DO. P. App. 13. That motion was denied without prejudice on January 20, 2005, after the defendants entered into a stipulation agreeing to bifurcate the ISP process for Fernald residents so that the initial ISP meeting would only concern the appropriate services and supports needed by the individual and a follow-up meeting would be held to separately discuss placement. P. App. 25-26.

Approximately one year later, on February 2, 2006, the Fernald parents filed a "status report" with the court, reasserting many of the same complaints raised in their earlier Motion to Reopen. On February 8, 2006, the district court appointed the United States Attorney for Massachusetts as court monitor "to advise the court as to whether the past and prospective transfer processes employed by the Department of Mental Retardation comply with federal law, state regulation, as well as the orders of this court...." P. App. 35. After a detailed, more than one-year-long investigation of the services and processes provided by DMR at its intermediate care facilities and in its community programs, the Monitor submitted his final report on March 6, 2007. P. App. 36.

D. The Monitor's Report and the District Court Injunction

The Monitor determined that the defendants had fully complied with state and federal law, and all provisions of the DO with respect to the operation of facilities, the community service system, and the provision of "equal or better" services to transferred class members, including the 49 residents of Fernald who had recently transferred to other residential settings. R. App. 19a-34a. There was no finding that the ISP process had been violated, or even a sug-

gestion that its purpose, function, and provisions were not fully respected.⁶ Indeed, the overwhelming majority of class members and their guardians reported "extremely positive attitudes regarding the moves."⁷ R. App. 32a-33a. Despite finding DMR in total compliance with federal and state law and with the DO, the Monitor speculated "that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald...." R. App. 39a.

In response to the Monitor's findings and conclusions, the parties filed briefs and documentary materials. The district court did not hold an eviden-

⁶ The statement of the Wrentham Association for Retarded Citizens, Inc. (Wrentham) that the Monitor and district court made "express findings that these individualized processes *were* conducted, systemically, in a way that prevented a truly personalized assessment of residents' needs" is simply incorrect. Wrentham Brief in Support of Petition at 15 (emphasis added) (hereafter "Wrentham brief"). The Monitor made no finding whatsoever concerning a violation of the ISP process or regulations. Rather, the Monitor found, and the district court agreed, that DMR had fully complied with all of its obligations under the DO. R. App. 19a-34a; P. App. 38.

⁷ Wrentham repeatedly and erroneously insists that DMR engaged in a pattern of coercion and intimidation in transferring Fernald residents to other facilities. See Wrentham brief at 10-12, 28. But neither the Monitor nor the district court made any findings or even a suggestion of intimidation or coercion. To the contrary, the district court found that "DMR had complied with the Final Order's requirement that transferred residents obtain 'equal or better services'" and "that the transfers that have taken place so far may have been in the best interests of residents...." P. App. 37-38, 39. The First Circuit correctly notes that Wrentham's claims of intimidation find no support in the Monitor's Report, the district court's opinion, or the record. P. App. 28, n. 9 ("...the record does not sustain the accusation").

tiary hearing, but instead relied entirely on the documentary record after hearing argument from counsel. The only document from the voluminous record to which the district court referred in its decision was the Monitor's Report. The district court adopted the Monitor's findings that all past transfers from Fernald met the "equal or better" requirement of the DO. P. App. 37-38. The district court also adopted the Monitor's speculative assumption about the harm that might occur to some residents if forced to relocate from Fernald and then found that, were defendants to close Fernald, this would constitute a systemic violation of DMR's regulatory ISP process. P. App. 38, 39-40. Relying upon pure conjecture regarding future events, based entirely upon its interpretation of the state ISP regulations and process, and contrary to its own finding that defendants were in full compliance with federal and state law, as well as the DO, the district court reopened the case and entered the August 14, 2007 order. P. App. 35-45; R. App. 1a-2a.

E. The First Circuit Decision

The First Circuit decision begins by noting the salient facts that led up to the district court's decision to reopen the case. Most notably, the Court pointed to three state budgetary acts from 2004 to 2007 that instructed DMR to close and/or consolidate its intermediate care facilities, including Fernald. P. App. 6. Related to these budgetary measures was the fact that the cost of care at Fernald averaged \$259,000 per person annually, while comparable care in a community setting costs the state only \$102,103 per year. P. App. 7. After detailing the history of the litigation, the relevant provisions of the DO, the proceedings related to the motion to reopen, the

Monitor's Report's findings and the district court's decision, P. App. 9-18, the First Circuit turned its attention to the specific issues on appeal.

The Court articulated the standard of review for construction of the consent decree in this action as *de novo*. P. App. 21. It then noted that ¶ 5 of the DO "plainly contemplated that DMR, in its discretion, would be able to close institutions," and that ¶7.b of the DO "does not permit state law, including the ISP regulations or review of the Superintendent's decision [regarding the provision of equal or better services] to become enforceable in the federal court." P. App. 21. The Court next focused on the findings of the Monitor's Report, the only document relied upon by the district court. Noting that the Monitor found that "[t]he defendants' practices under the Disengagement Order ... were consistent with the terms of the Order," as well as federal and state law, and "that DMR had complied with its obligations [between 2003 when the decision to close Fernald was announced and 2007]," the Court determined that there was no basis to conclude that the defendants had violated the terms of the DO. P. App. 22-23. With respect to the Monitor's and district court's speculation that the closing of Fernald would somehow compromise the integrity of the ISP process as set forth in state regulations, the First Circuit noted that the Monitor found, and the district court agreed, that all 49 residents transferred from Fernald subsequent to the announced closure had been treated in full conformity with the dictates of the DO, and that closures of other state schools had not resulted in any systemic failure of the defendants to meet their obligations under the DO. P. App. 24.

Because the district court's order was predicated upon its conclusion that the "systemic failure" consisted of "[a]dministering [the state regulatory ISP] process under the global declaration that Fernald will be closed," the Court undertook an analysis of the state ISP regulations. First, the Court noted that while the DO requires an ISP process, neither the DO nor the ISP regulations "predetermine the placement that which will result at the end of the ISP process." P. App. 24. Because the ISP process is focused on services a resident needs, not where those services are to be delivered, "the very nature of the ISP process contradicts the district court's conclusion." P. App. 24-25. Furthermore, if a resident disagrees with the outcome of the individualized ISP process, "the Disengagement Order commits these disputes to resolution in a state forum and under state law and thus provides no basis for federal court intervention." P. App. 27-28. For all these reasons and more, the First Circuit easily concluded that:

[t]his *individualized* process, that the Commonwealth has followed, cannot constitute a "systemic failure" to provide a compliant ISP process." The legal premise for the court's conclusion was in error.

P. App. 27 (emphases in original).

The First Circuit summarily disposed of the petitioners' remaining contentions that the district court's order could be sustained as a modification of the DO, an exercise of jurisdiction to rectify a putative new constitutional violation, or an exercise of ancillary jurisdiction.⁸ P. App. 28-33.

⁸ Because those determinations are not germane to this Petition, the Arc and DLC respondents will not describe them.

REASONS FOR DENYING THE WRIT

Since petitioners never asked the First Circuit to apply other than a *de novo* standard in its interpretation of the consent decree, they have waived the sole argument they now assert justifies this Court's review. They cannot claim that the appeals court erred in applying the very standard of review for which they argued in their briefing below.

Petitioners, for the first time in this case, now assert that the circuits have divided on the standard for reviewing a district court's interpretation of a consent decree. But the circuits are entirely uniform in applying a *de novo* standard in the context this case presents — interpretation of a state law provision incorporated in a consent decree. And no court of appeals has held that an abuse of discretion standard applies to a district court's interpretation of a consent decree generally. Accordingly, though courts have used slightly different language to describe their review of consent decree interpretation, there is no conflict in the holdings of the courts of appeals germane to this case.

Even if there were such a conflict, this would not be an appropriate case in which to address it, since the district court's interpretation of the consent decree here was so manifestly inconsistent with the decree's terms that it would have been overturned under any standard of review.

Respondents will also not address the discussion of *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999), contained in the amicus brief submitted by the Voice of the Retarded, Inc. (VOR). VOR amicus brief at 20-22. The questions presented do not raise any issue remotely related to *Olmstead*.

I. The Current Position of the Petitioners – That a Trial Court’s Interpretation of the Provisions of a Consent Decree Should Be Reviewed for Abuse of Discretion – Was Not Raised Below and, Therefore, Is Waived on Appeal.

Fed. R. App. P. 28(a)(9)(B) and (b)(5) require that both the appellants and the appellees include in their respective briefs “for each issue, a concise statement of the applicable standard of review.” The petitioners, in their First Circuit brief, articulated the standard of review as follows:

In reviewing a judgment decided by a judge sitting without a jury, this court must accept the District Court’s findings of fact unless they are clearly erroneous. This deferential standard extends to inferences drawn from the underlying facts.

This court must review conclusions of law, including the judge’s ultimate decision *de novo*.

Brief for Plaintiffs-Appellees Fernald Class Members at 19 (internal citations omitted).⁹ Because the proper interpretation of a consent decree is a conclusion of law, and because the interpretation of state law requirements incorporated into a consent decree is undeniably a conclusion of law, the petitioners cannot complain about the First Circuit’s decision to accept the standard of review they proffered. Significantly, not one of the cases included in the Table of Authori-

⁹ The only other party to submit a brief to the First Circuit urging affirmance of the district court order was the Wrentham Association for Retarded Citizens, Inc. It is not a petitioner here. See, Wrentham brief at 4, n.1; Supreme Court Rules 12.6 and 14.2.

ties of this Petition (other than prior opinions in this case) was cited in the Fernald Class' brief to the Court of Appeals. Issues neither raised nor decided by the Court of Appeals are not ordinarily accepted for review on certiorari. *Glover v. United States*, 531 U.S. 198, 205 (2001); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). Therefore, the Petition should be denied.

II. All Circuit Courts Apply a *De Novo* Standard in Reviewing a District Court's Interpretation of State Law or of State Law Requirements That Are Incorporated into a Consent Decree.

A. The Circuits Are Unanimous in Reviewing *De Novo* District Court Interpretations of State Law.

This Court has considered the standard of review pertaining to a district court's interpretation of state law and concluded that the appropriate standard is *de novo* review, without any deference to the trial court's analysis. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 239 (1991). Following the decision in *Salve Regina*, every Circuit has explicitly recognized that it must review district court determinations of state law *de novo*, without according any deference to the lower court's decision. *Bohne v. Computer Associates Intern., Inc.*, 514 F.3d 141, 143 (1st Cir. 2008); *Colavito v. New York Organ Donor Network, Inc.*, 438 F.3d 214, 220 (2d Cir. 2006); *Aciero v. Cloutier*, 40 F.3d 597, 609-10 (3d Cir. 1994) (*en banc*); *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994); *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008); *Aguirre v. Turner Const. Co.*, 501 F.3d 825, 828 (7th Cir. 2007);

Medical Liability Mut. Ins. Co. v. Alan Curtis LLC, 519 F.3d 466, 472 (8th Cir. 2008); *In re Estate of Covington*, 450 F.3d 917, 925 (9th Cir. 2006); *Anderson v. Commerce Const. Services, Inc.*, 531 F.3d 1190, 1193 (10th Cir. 2008); *Gilchrist Timber Co. v. ITT Raiponier, Inc.*, 472 F.3d 1329, 1331 (11th Cir. 2006); *F.D.I.C. v. Bender*, 127 F.3d 58, 64 (D.C. Cir. 1997); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1051 (Fed. Cir. 2001).¹⁰ As this consistent and well-established line of authority makes clear, an appellate court can and must review a district court's interpretation of state law *de novo* without deference to the lower court.¹¹

This rule applies with equal force to the standard of review for interpretations of statutory require-

¹⁰ While most of these cases, not surprisingly, arose under federal court diversity jurisdiction, the decision in *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (*per curiam*) makes clear that the rule of *Salve Regina* applies with equal force to cases arising under the court's federal question jurisdiction.

¹¹ Amicus VOR accepts, as it must, that *de novo* is the appropriate standard for review of a district court's interpretation of "a statute, regulation, or precedent of a higher court," as well as "a simple contract" or the unambiguous provisions of a consent decree. VOR amicus brief at 12, 15, 18. That is precisely what occurred here. The determination of whether DMR provided a "compliant ISP process" necessarily involves a judicial analysis of the requirements of that state regulatory process. Since VOR acknowledges that the district court was interpreting the state's ISP regulations when it decided that the policy decision to close Fernald violated the letter or spirit of those rules, VOR amicus brief at 11, the lower court's familiarity with the issues or its supervisory role in the litigation is not relevant. Rather, both as a matter of law and judicial efficiency, see VOR amicus brief at 18, ascertaining the meaning and scope of state law is a task uniquely appropriate for an appellate court to undertake *de novo*. *Salve Regina*, 499 U.S. at 231, 239.

ments incorporated into a consent decree. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-77 (1984) (reversing order purporting to enforce equal employment opportunity consent decree based on trial court's interpretation of Title VII). There simply is no split among the Circuits when reviewing a district court's application of state law or state law requirements that are included in a consent decree.

B. The Sole Basis for the District Court's Reopening the Case Was Its Unsupported Finding of a Violation of State Law.

The district court's order reopening the case and imposing additional obligations on the defendants was predicated solely on its determination that "administration of the ISP process" under the Commonwealth's stated policy that Fernald should be closed "amounts to a 'systemic violation' to provide a compliant ISP process within the meaning of the Final Order." P. App. 40. This conclusion rested entirely upon its reading and interpretation of state law requirements that were incorporated into the consent decree. P. App. 40-41.

Although Paragraph 7.a of the DO provides that plaintiffs could seek enforcement of the DO "[i]f the defendants substantially fail to provide a state ISP process in compliance with this Order," P. App. 59-60, the DO provisions concerning the ISP process simply obligated the defendants to maintain and comply with state regulations governing the ISP process.¹²

¹² The DO provides that DMR retains the discretion to modify its own regulations, as long as it discusses potential changes with the plaintiffs. It also specifies that any revised ISP process

Neither the district court nor the petitioners have asserted that the current ISP regulations contravene these requirements.¹³ Only by interpreting the ISP regulations to require that existing residents be given the opportunity to designate Fernald as their preferred residential placement could the district court possibly justify its decision and order of August 14, 2007.¹⁴ That the district court's decision is predicated upon its interpretation of the state ISP regulations is made clear by its discussion of "the essential function

be substantially equivalent to the ISP regulations then in effect with respect to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and certain principles regarding human dignity, self-determination, and the opportunity to live and receive services in the least restrictive and most normal setting possible. DO at ¶¶ 2.a, 2.b (cross referencing fns. 2 & 3), P. App. 54-56, 58-59. No allegation has ever been raised that DMR improperly amended its ISP regulations.

¹³ Because the defendant's ISP regulations complied in all respects with the requirements of the DO, the First Circuit properly concluded, under any standard of review, that the district court had no authority to reopen the case. P. App. 22-23 and 26-33.

¹⁴ The very notion upon which the district court acted – that residents or their guardians were somehow precluded from expressing their preference to remain at Fernald – is remarkable. Not only do the ISP regulations specifically provide for individual meetings with the resident and guardian where issues such as the individual's needs and preferences would be discussed, but the defendants entered into a Stipulation with the Fernald plaintiffs to bifurcate the ISP process so that discussions about appropriate placement would be held only after the resident's service needs had been determined. P. App. 25-26.

of the ISP process" and what the process is "intended to provide."¹⁵ P. App. 40.

C. The First Circuit Properly Applied a De Novo Standard in Reversing the District Court's Interpretation of State Law and a State Regulatory Process.

The First Circuit decision carefully analyzed all of the bases upon which the district court's order could be sustained. After finding that the facts found by the Monitor and adopted by the district court did not establish a violation, much less a systemic violation, of the DO, the First Circuit turned its attention to a careful analysis of the ISP regulations. P. App. 26-28. Based upon its *de novo* analysis of the ISP regulations, the First Circuit specifically rejected the district court's interpretation of DMR's regulations that "the removal of one of several residential facilities which have been found to comply fully with the Disengagement Order" could constitute a "violation of the ISP process." P. App. 24. The First Circuit explained that because of the individualized nature of ISP determinations, the petitioners' concerns that some Fernald residents might not receive the services and supports they need through that process does not establish a "systemic" violation. Rather, the regulations themselves provide the remedy for such an error by providing extensive administrative appeal and judicial review rights.

¹⁵ The DO specifically provided that individual disputes arising out of the ISP process are not encompassed within the district court's enforcement powers, but rather must be resolved through the state administrative appeal and judicial review process. DO at ¶ 7.b, P. App. 60; see also District Court decision, P. App. 44 ("Consistent with the Final Order, this court will not review the results of individual ISP processes").

P. App. 27-28. In undertaking this analysis of state law, the First Circuit properly accorded no deference to the district court. *Salve Regina*, 499 U.S. at 231, 239. However, because the First Circuit found the district court to be clearly wrong, deference would not have altered the outcome in any event. *Id.* at 237 (“Where the ... determinations of the two courts diverge, the choice between these standards [*de novo* or deference] is of no significance if the appellate court concludes that the district court was clearly wrong”).

III. Every One of the Courts of Appeals Applies a *De Novo* Standard in Reviewing a District Court’s Interpretation of an Unambiguous Provision of a Consent Decree.

A. Since Every Circuit Court Applies a De Novo Standard in Reviewing a District Court’s Interpretation of the Unambiguous Provisions of a Consent Decree, There Is No Split in Authority.

This Court routinely has applied a *de novo* standard to reviewing interpretations of consent decrees, which are, after all, contracts between the parties that have been endorsed and approved as court orders. In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court explained “that the ‘scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it’ or by what ‘might have been written had the plaintiff established his factual claims and legal theories in litigation.’” *Id.* at 574 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Simi-

larly, in *Braxton v. United States*, 500 U.S. 344 (1991), this Court reviewed a lower court's interpretation of a stipulation of the parties. The Court first noted that review of the stipulation would be undertaken "just as we would review a determination of the meaning and effect of a contract, or consent decree...." It then explained that "[t]he question, therefore, is not whether there is any reasonable reading of the stipulation that supports the District Court's determination, but whether the District Court was right." *Id.* at 350. It would be hard to find a clearer statement of non-deferential *de novo* review.¹⁶

Careful analysis reveals that all of the Circuits identify *de novo* as the controlling standard of review. Some, mostly in *dicta*, consider the issue of deference only if there is substantial ambiguity as to the meaning of a consent decree provision. The Circuits which the petitioners assert utilize this "deferential *de novo*" standard are the Fourth,¹⁷ Sixth, Seventh,

¹⁶ In articulating the proper approach to interpretation of the stipulation in *Braxton*, the Court cited with approval two cases, *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989), and *Frost v. Davis*, 346 F.2d 82, 83 (5th Cir. 1965). Both cases set out a standard of plenary review of a lower court's interpretation of a contract, although the *Washington Hosp.* court also acknowledged that where a lower court has engaged in fact finding to discern the meaning of an ambiguous contract term, the reviewing court will review those findings of fact for "clear error."

¹⁷ While the petitioners list the Fourth Circuit in their heading to Section A.1 of the Petition, the only Fourth Circuit decision which they cite is *Thompson v. United States Dep't of Housing and Urban Development*, 404 F.3d 821 (4th Cir. 2005). However, *Thompson* did not involve the interpretation of the provisions of a consent decree, but rather whether the trial

Eighth, and Ninth Circuits.¹⁸ A review of the cases relied upon by the petitioners demonstrates that the purported split in authority is more ephemeral than real, and, in any event, would have no impact on the outcome in this case.

The Sixth Circuit case relied upon by the petitioners, *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-72 (6th Cir. 1998), articulated a standard that grants some deference to “the interpretation of a consent decree by the district court that *crafted* the consent judgment.” (emphasis added). That case is distinguishable on its face from this Petition, since, contrary to the erroneous assertion of the petitioners, the district court below did not craft the DO, thereby rendering the Sixth Circuit’s standard inapplicable to the current case. Moreover, the *Sault Ste. Marie* court found that the terms of the consent judgment at issue were unambiguous, thereby rendering any reliance on deference unnecessary.¹⁹ *Id.* at 373.

court was justified in modifying a consent decree based upon changed circumstances.

¹⁸ VOR incorrectly asserts that the Second Circuit also utilizes a deferential *de novo* standard, citing *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985). VOR amicus brief at 8-9. However, the *Berger* court applied a pure *de novo* standard of review, *id.* at 1568, as have later Second Circuit panels. See, e.g., *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir. 1996); *Barcia v. Sitkin*, 367 F.3d 87, 106 (2d Cir. 2004).

¹⁹ The other Sixth Circuit case mentioned in the Petition, *Huguley v. General Motors Corp.*, 52 F.3d 1364 (6th Cir. 1995) actually qualifies the notion that the trial court’s interpretation is accorded any meaningful deference. The *Huguley* court first notes the apparent inconsistency between according deference to the trial judge and reviewing the decree *de novo* and then explains that “the district court’s reading of the decree [is]

In neither of the two Seventh Circuit cases cited by the petitioners was deference in fact accorded to the trial court. In *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003), Judge Posner specifically noted that the deference standard “is not applicable here,”²⁰ and Judge Ripple explained that the statements regarding deference were “admittedly dicta.” *Id.* at 288. Similarly in *United States v. Alshabkhoun*, 277 F.3d 930, 935 (7th Cir. 2002), the Seventh Circuit found that the defendant had violated “the clear terms of the Consent Decree,” thereby rendering resort to a deference standard unnecessary.²¹

The Eighth Circuit case relied upon by the petitioners first reviews the district court’s consideration of extrinsic evidence regarding the intent of the parties for clear error, and then relies upon that finding regarding intent in its evaluation of “the decree as written.” *United States v. Knot*, 29 F.3d 1297, 1300 (8th Cir. 1994). It is well established that a court can consider extrinsic evidence regarding the intent of the parties to resolve an ambiguity in a contract and

merely an additional tool for contract interpretation.” *Id.* at 1369-70 (emphasis added). Ultimately, the Court affirmed in part, reversed in part and remanded the matter to the district court for further consideration. *Id.* at 1370-73. However, nowhere in the analysis of the issues does it signal that it is granting any deference to the district court.

²⁰ As Judge Posner explained, “the rationale for deferential review fails when as in this case the judge’s decision does not turn on his interpretation of the agreement that he approved.” *Id.* at 286-87.

²¹ Lending further strength to the fact that the deference standard articulated in *Alshabkhoun* was dicta is the fact that the “sole issue” on appeal did not even include the proper interpretation of the decree, but rather whether the enforcement of the decree violated public policy. *Id.* at 934.

that those findings are subject to review under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Indeed, the petitioners acknowledge this general rule. Petition at 30-31. To the extent that the Eighth Circuit's deference rule is tied to the lower court's factual findings based upon extrinsic evidence, it is neither controversial, nor relevant to this case.²²

Like all the other Circuits, the Ninth Circuit begins with a *de novo* standard of review, although it occasionally goes on to afford some deference to the district court's interpretation of the term of its consent decree, if it has been involved in "extensive oversight of the decree from the commencement of the litigation to the current appeal." *Compare United States v. F.M.C. Corp.*, 531 F.3d 813, 818-19 (9th Cir. 2008) (including deference) *with Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990) (no deference); *Botefur v. City of Eagle Point*, 7 F.3d 152, 156-57 (9th Cir. 1993) (no deference). The Ninth Circuit's condition for deference is not present here, since the district court was not involved with the DO for over a decade, had never been asked to resolve any dispute thereunder, and, instead, had removed the case from its docket for over eleven years prior to the Fernald parents filing their first motion to reopen. Even if

²² There were no facts in dispute in the current case. All parties and the trial court accepted the factual findings of the Monitor regarding the State's compliance with the federal law, state law, and the DO. The petitioners attempt to characterize the Monitor's speculation regarding future noncompliance if Fernald were closed as a finding of fact that was adopted by the trial court. This is inaccurate. As the First Circuit properly explained, it is simply not possible to infer from a history of full compliance with all aspects of the decree that the State would, sometime in the indefinite future, violate it and then do so in a systemic fashion. P. App. at 23-24, 27.

the condition were applicable, the First Circuit's conclusion would not be affected, for like the Ninth Circuit in *F.M.C.*, it rejected the district court's interpretation, finding that the provision at issue "clearly expresses the parties' intent...." *F.M.C.*, 531 F.3d at 821. In doing so, the Ninth Circuit aligns itself with all the other Circuits which recognize that *de novo* always is the standard of review and that deference does not apply to unambiguous provisions of a consent decree.²³

The current case involved the enforcement of a consent decree crafted by the parties, not the trial court, and whose provisions were unambiguous and not interpreted by the lower court.²⁴ Under such circumstances, all Circuits apply an unadulterated *de novo* standard of review. There is no split of authority in the Circuits over the appropriate standard of review at issue in this case.

²³ The other two Ninth Circuit cases relied upon by petitioners also fail to further their cause. In *Nehmer v. Veterans' Administration*, 284 F.3d 1158 (9th Cir. 2002), the Court found that the plain language of the decree dictated the outcome. *Id.* at 1161-62. The court in *Nehmer* also noted that in class action litigation, it is particularly important to look to the plain language of the decree, "because a member of the class who was not present at any negotiations would be at a disadvantage in presenting extrinsic evidence...." *Id.* at 861 (quoting *Molski v. Gleisch*, 318 F. 3d 937, 946 (9th Cir. 2003)). Similarly, in *Officers for Justice v. Civil Service Comm'n of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991), the Circuit Court found that the district court's interpretation "is supported by the language of the decree."

²⁴ Even the party supporting the Petition conceded that the provisions of the DO at issue in this case were unambiguous. Wrentham brief at 9 ("Importantly, the district court's decision was not based on a construction of disputed terms in the Disengagement Order").

B. That Some Courts, Mostly in *Dicta*, May Articulate a “Deferential *de Novo*” Standard of Review Does Not Constitute a Split of Authority Meriting Supreme Court Review.

The cases relied on by the petitioners also fail to show that the outcome of any one of them was impacted by deference accorded to the lower court’s interpretation of the consent decree. Indeed, in many, if not most of the cases, the occasional references to “deference” constituted nothing more than *dicta*. In others, the reference appears to signal nothing more than deference to the trial court’s findings of fact regarding the intent of the parties when discerning the meaning of ambiguous decree provisions, which is already required by Fed. R.Civ. P. 52(a). Finally, in the remaining few cases, the concept of deference reflects nothing more than the common sense notion, articulated by this Court, that appellate courts should give “careful consideration of the district court’s analysis” and “will naturally consider this analysis in undertaking its review.” *Salve Regina*, 499 U.S. at 232-33.²⁵ To the extent that the

²⁵ This common sense approach to the treatment of lower court interpretations of consent decrees is utilized by the First Circuit in appropriate cases. See *F.A.C. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 192, 194 (1st Cir. 2006) (noting that it is “common sense” to accord some deference to the careful analysis of the district court regarding an ambiguous consent decree provision where the judge participated in the negotiations and his decision “is reasonable and more likely right than wrong”). That the First Circuit was aware of this approach is evident from the fact that it cited *F.A.C.* in support of the *de novo* standard of review. P. App. 21. That the First Circuit did not accord any deference to the district court decision here is due, not to abandonment of its

district court's decision is based on any particular "expertise" and demonstrates "analytical sophistication," it will, of course, be more persuasive to the reviewing court. *Id.* Appellate respect for the well reasoned analysis of the trial court is not at all inconsistent with *de novo* review. *Id.* at 233.

Thus, the Circuits all begin with, and adhere to, a *de novo* standard of review in analyzing a district court's interpretation of a consent decree, particularly where the provision at issue is unambiguous, as it was here. When provisions are ambiguous and the parties' intent is at issue, some Circuits engage in the "appropriately respectful application of *de novo* review" endorsed by this Court in *Salve Regina*. *Id.* While the Circuits may describe this exercise somewhat differently, there is no meaningful difference in actual application. In any event, this is not an issue of sufficient importance to warrant plenary review and, certainly, this is not an appropriate case to present this issue.

C. No Circuit Has Held That Review of Provisions of a Consent Decree Should Be Only for Abuse of Discretion, As Argued by the Petitioners.

The petitioners assert that the appropriate standard of review of a district court's interpretation of a consent decree should be "abuse of discretion." Petition at 3. No Circuit has adopted this standard of review of a consent decree, and for good reason. Such a decision would constitute a total abdication of the Circuit Court's "obligation of responsible appellate review." *Salve Regina*, 499 U.S. at 239. Further-

"common sense" approach, but because the facts and circumstances of this particular case did not call for deference.

more, it would conflict with this Court's rulings in *Firefighters v. Stotts*, 467 U.S. at 574, *United States v. Armour & Co.*, 402 U.S. at 681-82, and *Braxton v. United States*, 500 U.S. at 350, that reviewing courts discern the meaning of a contract or consent decree "within its four corners."

The only case that the petitioners cite that articulates an "abuse of discretion" standard is *Thompson v. U.S. Dep't. of H.U.D.*, 404 F.3d at 827. However, *Thompson* did not involve review of the district court's interpretation of a consent decree, but rather the lower court's determination of whether the requisite showing had been made to modify the decree due to changed circumstances. *Id.* Because the district court in the present case did not purport to justify its order based upon any modification of the decree, but rather on the defendants' putative violation of it, the standard articulated in *Thompson* is simply irrelevant to the question presented. Certainly, where the petitioners are seeking through their Petition for Certiorari to establish a standard of review that not one Circuit has adopted and that is at odds with Supreme Court precedent, the Petition does not present an issue warranting certiorari review.

IV. Since the Sole Basis for the District Court's Injunction Was the State's Policy Decision to Close Fernald, and Since the Consent Decree Explicitly Guaranteed that the State Had Discretion to Allocate its Resources and to Close its Public Institutions, the First Circuit Properly Concluded That the District Court Lacked Jurisdiction to Reopen a Thirty-Five-Year-Old Case and Had Improperly Found a Violation of the State's ISP Process.

A. The Sole Basis for the District Court's Order Was the Closing of Fernald, Which Was Explicitly Envisioned and Authorized By the Consent Decree.

The sole basis for the district court's order was its conclusion that "the Commonwealth's stated global policy judgment that Fernald should be closed, has damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." P. App. 39. This conclusion was drawn from the Monitor's Report which, without any clinical or other expert evidentiary support and, instead, relying primarily on stereotypes, unfounded fears and sympathy, opines "that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald to another ICF/MH or to a community residence." R. App. 39a. The Monitor then recommends that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." R. App. 39a-40a. The district court

specifically adopted these speculative concerns and then translated them into a violation of the state regulatory ISP process.²⁶ P. App. 38.

The district court's guess about what may happen in the future, particularly where it is contrary to all evidence about what has happened in the past, is clearly not an adequate foundation upon which to reopen a fifteen-year-old disengagement order, restrict the State's discretion to close a public institution,²⁷ and enter an order modifying a mutually agreed-upon consent order over the objection of both the state defendants and other plaintiffs. *See, U.S. v. Michigan*, 940 F.2d 143, 163 n.12 (6th Cir. 1991) (court cannot modify decree based upon conjecture); *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 200-01 (2003); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-106 (1983).

²⁶ To the extent that the district court's order might be interpreted as predicated on a speculative conclusion that placements from Fernald would result in its residents being denied "equal or better services" at their new location, such a contention is belied by the record. As the district court found, "[a]fter a year of exhaustive and meticulous study, the Court Monitor concluded that the DMR had complied with the Final Order's requirement that transferred residents obtain 'equal or better services'." P. App. 37-38. Nevertheless, the district court inappropriately presumed, without the benefit of any supporting evidence, that in the future, State officials will not continue to place and provide services for Fernald residents in good faith, but rather will deny them the "equal or better" services to which they are entitled at any new location to which they may be transferred. P. App. 38-40. The First Circuit correctly noted that this presumption had no basis in the record. P. App. 22-27.

²⁷ The Commonwealth previously had closed two of the facilities without judicial interference and consistent with extant court orders.

The district court's order is in direct contravention of the specific provision of the DO which provides that "nothing in this Order is intended to detract from or limit the *discretion* of the defendants in ... managing and determining ... the budget of the Department of Mental Retardation ... or allocating its resources to ensure equitable treatment of its citizens." P. App. 58 (emphasis added). This proviso reserved to DMR the discretion to determine whether it would close any of its large public institutions. This provision was negotiated during a period when DMR had just closed one facility and was planning for the closure of another, P. App. 22, 24, and the district court judge specifically noted on numerous occasions that "[t]he court is not opposed to the eventual closing of Dever [State School] or any other Consent Decree facility." *Ricci v. Okin*, 781 F. Supp. 826, 827-28 (D. Mass. 1992); P. App. 22, n. 8. Indeed, in the decision accompanying the 2007 order reopening the case, the district court acknowledged that the consent decree "does not prohibit the closure of any facility." P. App. 43, n. 17.

The First Circuit recognized that the DO expressly permitted the closure of DMR's facilities, and took as a given that the State had the discretion to decide which facilities it would operate. See, e.g., *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980) (the federal Medicaid law that subsidizes nursing homes and ICF/MRs furnishes no "right to continued residence in the home of one's choice"). It held that the ISP process does not guarantee an individual the placement of their choice or the right to remain in a particular facility or program. P. App. 24. It noted that the appeal sections, 115 Code Mass. Regs. §§ 6.30-6.34, 6.63, are available if the individual disagrees with a proposed modification or

transfer. P. App. 27-28. As a result, it correctly concluded that the district court lacked jurisdiction to reopen a thirty-five-year-old lawsuit, since the lower court improperly interpreted state law and wrongly concluded that the State's decision to close Fernald undermined the state ISP process that was required by the DO. P. App. 22-28.

B. Although the First Court Acknowledged the District Court's Longstanding Oversight of the State's Mental Retardation Facilities, It Properly Applied a De Novo Standard in Concluding That the District Court Did Not Have Jurisdiction to Reopen the Case, Since There Was No Evidence of a Violation of Either Federal Law or Any Provision of the Consent Decree.

The First Circuit was well aware of the district court's longstanding involvement with this case. It specifically noted that the court "has conscientiously and with great care presided over institutional reform litigation concerning these mentally retarded persons since 1972." P. App. 3. It also acknowledged that "[t]he district court actively oversaw the implementation of the consent decrees for almost ten years" prior to the DO.²⁸ P. App. 10. Finally, the Court "recognize[d] the able stewardship exercised by

²⁸ This is a reference to the district court's oversight of the individual decrees in the five separate cases. The district court's active oversight ended with the entry of the DO in 1993, which closed the cases and removed them from the court's active docket. DO at ¶ 1, P. App. 53. The cases remained dormant until 2004, when the proceedings that culminated in the district court's 2007 order and ensuing appeal began.

the district court over the years, which led to the improvement of conditions for the Fernald residents and to the landmark 1993 consent decree.” P. App. 34. However, the Court also recognized that the district court’s active involvement with the case ended in 1993 with the entry of the DO.

Despite these acknowledgments of the district court’s long involvement with the case and its obvious recognition of its precedents which accord some deference in appropriate circumstances to a trial court’s interpretation of a consent decree that it has been actively administering, P. App. 21 (citing *F.A.C., Inc.*, 449 F.3d at 192 for the standard of review), the First Circuit properly accorded no deference to the district court in this case. First, the district court’s determination of a consent decree violation was grounded entirely on its erroneous interpretation of state regulations and their incorporation into the consent decree. *Salve Regina*, 499 U.S. at 231, 239. Second, there was no interpretation of an ambiguous provision of the DO – as opposed to state law – by the district court to which the First Circuit could accord deference. Finally, the district court’s order directly contravened the provision of the DO that granted to the defendants discretion over decisions to operate or close facilities, and was based upon the illogical inference that the defendants, who had been found to have totally complied with the DO in all respects, would, nevertheless, fail to do so in the future absent court intervention.²⁹ Any one of these reasons would have justified reversal under any standard of review.

²⁹ Wrentham incorrectly claims that the First Circuit improperly reviewed the district court’s 2007 order “*de novo*.” Wrentham brief at 27-29. In fact, the First Circuit did not review or interpret *any* aspect of the 2007 order. Rather, it

C. Certiorari Review Is Not Appropriate Because Resolution of the Issue Raised Will Not Alter the Outcome Below.

As the First Circuit's decision makes clear, this was not a close case. The district court's order was neither factually nor legally sound. A more deferential standard of review would not have changed the result.³⁰ As this Court has observed, "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue ... differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." *Salve Regina*, 499 U.S. at 237-38. This is not one of those "few cases." The First Circuit easily found that the district court order was erroneous. The result would not be different under a "deferential *de novo*" approach. Because resolution of the issue raised in the Petition will not alter the outcome of this case, review on certiorari is not appropriate. The Petition should be denied.

determined that the district court did not have the authority to reopen the case or to enter any order at all. P. App. 20, 28.

³⁰ Amicus VOR asserts that application of a more deferential standard of review might produce a different result, but utterly fails to explain how that might occur. VOR amicus brief at 10. In fact, the opposite is true. Under any standard, the district court's speculation that DMR would in the future systemically violate its ISP regulations during the process of closing Fernald is untenable. Where the evidence established and the court found that DMR had fully complied with state law, federal law and the DO with respect to the transfer of Fernald residents, it defies logic and law to conclude that DMR would not continue to do so in the future. It is not surprising that the First Circuit had little difficulty determining that the decision to reopen the DO was error.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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